Fundamental rights and the framework of internal market adjudication

Fundamental rights and the framework of internal market adjudication: is the Charter making a difference?

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1. Introduction

Article 26(2) TFEU establishes that '[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured *in accordance with the provisions of the Treaties*'. This wording suggests that the goal of realising a free movement-driven internal market sits within – and is in fact contained by – the wider structure of the Treaties and the many objectives committed to therein. The breadth of parallel Union ambitions outlined in Article 3(3) TEU reinforces that interpretation.[1] Fundamentally, it reflects too the idea that 'the Union is not only a market to be regulated, but also has values to be expressed'.[2] However, some analyses of pre-Lisbon case law argued that the objective of free movement too strongly ordained the legal shape of the internal market in the framework of judicial review applied by the Court of Justice; that other – legitimate – values were improperly side-lined in consequence; and that this approach was particularly problematic when the values in question had the status of fundamental rights.

As a consequence of the entry into force of the Lisbon Treaty, the Union now 'recognises the rights, freedoms and principles set out in the Charter of Fundamental

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[1] Article 3(3) TEU provides: 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'.

[2] AG Bot in Case C-34/10 *Brüstle*, EU:C:2011:138, para. 46 of the Opinion.

Rights of the European Union…which shall have the same legal value as the Treaties' (Article 6(1) TEU). That provision solves half of a problem by communicating legal equivalence for Treaty freedoms and fundamental rights. But where does that leave the question of value distinctiveness? Article 2 TEU states that '[t]he Union is *founded on* the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.[3] This contribution therefore asks whether the recasting of primary Union law is making a difference to internal market adjudication post-Lisbon, by examining whether the conferring of legal effect on the Charter in particular has altered the framework applied in judicial review.[4] At a general level, the question reflects the established distinction between form and substance evaluation of judicial review practices.[5] More specifically, the chapter investigates a critical question drawn from Weatherill: whether 'the Lisbon Treaty's entry into force in 2009 and in particular its grant of binding effect to the Charter [altered] *the methodology* or *priorities* involved in detailed determinations as to whether the EU legislature has met the required standards of compliance with fundamental rights',[6] generalising the concern to include adjudication that pitches internal market law and fundamental rights 'against' each other in situations of negative integration too. The interconnected criteria of methodology and priorities open questions on both *how* the Court is managing these cases now and *why* it might be making those choices.

In Section 2, the main points of criticism on relevant pre-Lisbon case law are briefly outlined, to establish what the problem with internal market adjudication

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[3] On the premise that '[t]hese values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

[4] For analysis of how the rights protected by the Charter are being applied and interpreted in *substance*, see e.g. on privacy and data protection, Andrew Roberts 'Privacy, data retention and domination: Digital Rights Ireland Ltd v Minister for Communications' (2015) 78:3 MLR 535; Marie-Pierre Granger and Kristina Irion 'The Court of Justice and the Data Retention Directive in Digital Rights Ireland: telling off the EU legislator and teaching a lesson in privacy and data protection' (2014) 39:6 ELRev 835.

[5] See generally, Phil Syrpis 'Theorising the relationship between the judiciary and the legislature in the EU internal market' in Phil Syrpis (ed.) *The Judiciary, The Legislature, and the EU Internal Market* (CUP 2012) 3.

[6] Stephen Weatherill 'Use and abuse of the EU's Charter of Fundamental Rights: on the improper veneration of "freedom of contract"' (2014) 10:1 ERCL 167 at 179 (emphasis added).

actually was. The central point of tension reflects a charge that, on balance, the Court of Justice wrongly prioritised fulfilment of the economic freedoms and the project of market-opening over the normative status and material protection of fundamental rights. The imprint of the Charter on post-Lisbon case law at a general level is then outlined in Section 3, providing context for the analysis that follows in Section 4: has the Charter since altered either the *methodology* or *priorities* engaged by the Court?[7] The legal force of the Charter has perhaps been seen most strikingly to date in the judicial invalidation of EU legislation for non-compliance with EU fundamental rights standards. In the sphere of positive integration and market-making, that development is striking since the Court had also long been criticised for its light-touch review of EU legislative acts.[8] Short of situations of invalidity, however, the wide margin of discretion enjoyed by the EU legislature has not been much receded.[9]

More generally, it will be seen that the language of judicial review cases has definitely altered. In particular, a *fair balance* method is now applied more consistently in situations where different interests collide. However, it will be argued that notwithstanding the language used, the established methods of and priorities within internal market law have not shifted significantly in a more substantive sense. First, on the question of methodology, the Court retains its classical approach to evaluating *restrictions* on fundamental rights when an economic freedom is also being restricted. Second, on the question of priorities, the Charter could not address a systemic feature of the EU's framework for fundamental rights protection: that the latter must still be respected through the realisation of other Union policies rather than constituting an independent policy goal per se. But it will be argued that while achievement of the internal market remains a dominant policy objective, it is not necessarily conceived or progressed as an end in itself. Instead, realising the internal market is – still – profoundly part of the bigger project of shaping and distinguishing

[7] To avoid overlap with other contributions to the volume, the analysis in this chapter focuses on internal market case law concerning free movement and the approximation of laws; further, the free movement of persons is considered only in connection with the exercise of the economic Treaty freedoms i.e. not under Articles 20 and 21 TFEU.

[8] See e.g. Stephen Weatherill 'Competence creep and competence control' (2004) 23 YEL 1.

[9] See e.g. commenting on Case C-283/11 *Sky Österreich*, EU:C:2013:28, Georgios Anagnostaras 'Balancing conflicting fundamental rights: the Sky Osterreich paradigm' (2014) 39:1 ELRev 111.

the autonomous character of Union law. In that sense, internal market adjudication reflects concerns and dynamics that are connected to and play out at a more systemic level, dynamics that have also recently obstructed the Union's troubled route to ECHR accession. Asking the question of what kind of internal market the Charter can contribute to making is therefore still inherently tied to the question of the kind of *Union* that law more generally contributes to making too.

2. Fundamental rights and the internal market: what was the problem?

The essentials of fundamental rights review were fixed long before the Charter acquired the status of primary Union law. As general principles of Union law, fundamental rights had to be respected by both Union institutions and the Member States in the making of internal market law, an area of shared competence, with the proviso that Member States were bound by EU fundamental rights standards only if it could be established that they were 'implementing' Union law.[10] Importantly for present purposes, the Court construed the justification of national measures that restricted free movement rights as also falling 'within the scope' of Union law.[11] This reasoning ensured that EU fundamental rights were a relevant basis for judicial review in a much wider range of circumstances, and in both the positive and negative spheres of market integration.

The judgments in *Laval* and *Viking Line* exemplify pre-Lisbon criticisms of the Court regarding the fundamental rights questions that arose within internal market adjudication.[12] Both cases concerned the distinctive nature and functions of collective action in the context of labour disputes, with outcomes that prioritised the market-expanding free movement rights of traders over constitutionally protected national standards for fundamental social rights in Sweden (*Laval*) and Finland (*Viking Line*). The significance attributed to free service provision and establishment in consequence – a construction that maps, at a basic level, the restriction/derogation

[10] E.g. Case 5/88 *Wachauf*, EU:C:1989:321, para. 19.
[11] Case C-260/89 *ERT*, EU:C:1991:254, paras 42 and 43.
[12] Case C-341/05 *Laval un Partneri*, EU:C:2007:809; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union ('Viking Line')*, EU:C:2007:772.

structure encoded in the Treaty's free movement provisions – was perceived as a failure to concede the normative and material priority that ought to attach to claims based on the protection of fundamental rights. A particular point of criticism concerned the fact that the Court applied its standard free movement law version of proportionality analysis – especially starkly in *Laval* – whereas the specific character of social rights as fundamental rights should have engaged the development of a more context-sensitive paradigm.[13] Article 3(3) TEU as amended by the Lisbon Treaty – i.e. after the decisions in *Laval* and *Viking Line* – now characterises the internal market as 'a highly competitive social market economy, aiming at full employment and social progress'. But the continuing problem is that these objectives bring different priorities into conflict in concrete cases; and it is precisely 'the ambiguity of the relevant legal material [that] ensures that considerable power has been delegated to the Court to choose between competing interpretations'.[14]

Thinking about how better to manage the questions that the rulings in *Laval* and *Viking Line* had intensified, the ruling in *Schmidberger* (delivered four years earlier) was consistently preferred as providing an alternative method of reasoning – premised on the idea of *balancing* – that should be applied when fundamental rights are invoked to defend restrictions of the Treaty freedoms.[15] In that case, a major

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[13] For analysis, see e.g. Anne C.L. Davies 'One step forward, two steps back? *Laval* and *Viking* at the ECJ' (2008) 37 ILJ 126; Jonas Malmberg and Tore Sigeman 'Industrial action and EU economic freedoms: the autonomous collective bargaining model curtailed by the European Court of Justice' (2008) 45 CMLRev 1115; Tonia Novitz 'A human rights analysis of the Viking and Laval judgments' (2007-2008) 10 CYELS 541; Silvana Sciarra 'Viking and Laval: collective labour rights and market freedoms in the enlarged EU' (2007-2008) 10 CYELS 563; Phil Syrpis and Tonia Novitz 'Economic and social rights in conflict: political and judicial approaches to their reconciliation' (2008) 33 ELRev 411.

[14] Stephen Weatherill 'From economic rights to fundamental rights' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds.) *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing, 2012) 11 at 13. Reflecting back on this strand of case law and the responses to it, see AG Wahl in Case C-396/13 *Sähköalojen ammattiliitto*, EU:C:2014:2236, paras 26-35 of the Opinion.

[15] Case C-112/00 *Schmidberger,* EU:C:2003:333; and see e.g. Loïc Azoulai 'The Court of Justice and the social market economy: the emergence of an ideal and the conditions for its realization' (2008) 45 CMLRev 1335 at 1349 ('practical method for...reconciliation'); Charlotte O'Brien 'Social blind spots and monocular policy making: the ECJ's migrant worker model' (2009) 46 CMLRev 1107 at 1137 ('integrated interpretation'); and Sybe de Vries 'The protection of fundamental rights within Europe's internal market after Lisbon – An endeavor

intra-State transit route in Austria was blocked for approximately 30 hours by an officially sanctioned environmental protest. The Court confirmed the consequential impact of the closure as a restriction of the free movement of goods, triggering the consideration of public interest justification arguments based on freedom of assembly and freedom of expression. The judgment followed the standard structure of free movement law at the basic level indicated above: first, confirmation of a restriction of free movement rights; second, justification of that restriction through recourse to 'overriding requirements relating to the public interest';[16] and, finally, an assessment of proportionality. Having established (by referring to the ECHR) that freedom of expression and freedom of assembly are not absolute rights, the Court stated that '[c]onsequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed'.[17] But then it continued:

> The *interests involved must be weighed* having regard to all the circumstances of the case in order to determine *whether a fair balance was struck between those interests*. The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-[EU] trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.[18]

It is important to observe what does not change in this extract. First, economic freedoms and fundamental rights are still being evaluated against each other: fundamental rights do not take precedence. Second, fundamental rights are still being considered at the justification stage of the analysis; they do not come 'first' here either, in a way that would displace the prior question of determining whether a

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for more harmony' in de Vries, Bernitz and Weatherill (eds.) n14 above, 59 at 94 ('ideal situation').

[16] *Schmidberger*, para 78.

[17] *Schmidberger,* paras 79-80.

[18] *Schmidberger,* paras 81-82 (emphasis added).

restriction of free movement rights exists.[19] But the way in which the Court framed the balancing exercise that should then be undertaken – including the explicit allocation of a 'wide margin of discretion' for national authorities – did signal a potentially distinctive method.

However, it is also important to remember that authorising a peaceful environmental protest did not raise anything *particular* about Austrian constitutional values. The allocation of national discretion is considerably more complicated when Member States raise a distinctive or specific level of national protection of a fundamental right, which does not map onto the broadly comparable pan-EU standard, in order to justify the retention of measures or practices that restrict Treaty freedoms. The ruling in *Omega* exemplifies that situation.[20] The case concerned judicial review of a German police authority decision to prohibit laser games involving the simulation of killing, which in turn affected the cross-border provision of related goods and services. Importantly, the referring court emphasised the defining character of human dignity in the German Constitution.[21] The Court of Justice initially stated that it was *not* attaching special significance to that point.[22] In the next part of its ruling, however, it did precisely that through, first, its characterisation of the German restriction as a legitimate public policy derogation – notwithstanding the very strict parameters normally applied in that respect[23]– and, second, its generous assessment of proportionality:

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[19] See similarly e.g. Case C-244/06 *Dynamic Medien*, EU:C:2008:85, confirming that 'the protection of the child is a legitimate interest which, in principle, justifies a restriction on a fundamental freedom guaranteed by the EC Treaty' (para 42). For critique, see Catherine Barnard 'Social dumping or dumping socialism?' (2008) 67:2 CLJ 262.

[20] Case C-36/02 *Omega,* EU:C:2004:614.

[21] *Omega,* paras 11-12.

[22] '[The Union] legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with [Union] law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right' (*Omega*, para 34).

[23] E.g. Case C-348/96 *Calfa*, EU:C:1999:6 para 23. The concept of public policy as a derogation from free movement rights is also normally based on *shared* as well as exceptional *ordre public* policy concerns, which makes it difficult to conceptualise as a mechanism for protecting distinctive national conceptions of a particular right or value; see further on this point, John Morijn 'Balancing fundamental rights and common market freedoms in Union law: *Schmidberger* and *Omega* in the light of the European Constitution' (2006) 12 ELJ 15 at 39.

> It is not indispensable…for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards *the precise way in which the fundamental right or legitimate interest in question is to be protected*… In this case, it should be noted, first, that, according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, *corresponds to the level of protection of human dignity which the national constitution seeks to guarantee* in the territory of the Federal Republic of Germany. It should also be noted that, by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus 'play at killing' people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.[24]

The plain statement that 'the contested order did not go beyond what is necessary' without any further analysis or explanation of that finding contrasts sharply with the context-insensitive review of proportionality in *Laval* in particular: notwithstanding the distinctiveness of the Swedish constitutional conception of the right to collective bargaining in that case; the Court's recognition of that right as a fundamental right protected by EU law;[25] and its statement that the Union has 'not only an economic but also a social purpose'.[26] What the pre-Lisbon case law therefore demonstrates is a problem of inconsistency. When the status of public interest values as fundamental rights made a material difference, relevant judgments reflected the fact that the Court *did* adjust its approach to judicial review in terms of both methodology and priorities. But this adjustment was not effected systematically, deepening the criticism about insufficient appreciation of or respect for the normative distinctiveness of fundamental rights and renewing perceptions of market hegemony.

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[24] *Omega*, paras 37-39 (emphasis added).

[25] *Laval*, para. 91. Koen Lenaerts and Jose A. Gutiérrez-Fons have emphasized the factor of protectionism as a key difference between cases such as *Schmidberger* and *Omega*, on the one hand, and *Laval* and *Viking Line*, on the other ('The constitutional allocation of powers and general principles of EU law (2010) 47:6 CML Rev 1629 at 1666); however, the common factor of striving to recognise normative significance for fundamental rights challenges that analysis; see e.g. Vasiliki Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart Publishing, 2015) 222-224.

[26] *Laval*, para. 110.

3. The imprint of the Charter on post-Lisbon case law

At one level, how the Charter has been used in post-Lisbon case law reflects the virtue of continuity.[27] For example, at the stage of justification, the importance of a public interest argument is 'confirmed' when that value is protected in the Charter too.[28] The Charter's preamble mirrors this idea through its statements about 'reaffirming' rights and making rights 'more visible'. But it is also made clear there that 'it is necessary to *strengthen* the protection of fundamental rights' too. Following that premise, Iglesias Sánchez has demonstrated empirically how 'the Charter has improved the centrality and weight of fundamental rights, reinforcing both their visibility in the legal discourse of the Court and their role as parameters of *constitutionality*',[29] arguing that this, in turn, 'has contributed to reinforcing the centrality of human rights in legal reasoning'.[30] It is this sense of the Charter's added value that will be summarised briefly here.

Since the Lisbon Treaty came into force, the Charter has undoubtedly made a material imprint on the case law of the Court of Justice. At a very basic level, its provisions are habitually raised in submissions before the Court, even if the arguments developed on that basis are not always picked up in the actual judgment. Article 47 of the Charter – protecting the right to an effective remedy and to a fair trial – is the *provision* engaged by litigants most frequently to date.[31] The areas of EU

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[27] See generally, Sara Iglesias Sánchez 'The Court and the Charter: the impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights' (2012) 49:5 CMLRev 1565.

[28] E.g. on the importance of protecting public health being 'confirmed' by Article 35 of the Charter, see Case C-84/11 *Susisalo*, EU:C:2012:374, para. 37 and Joined Cases C-159/12 to C-161/12 *Venturini*, EU:C:2013:791, para. 41 (both cases concern freedom of establishment).

[29] Iglesias Sánchez, n27 above, 1576 (emphasis in original).

[30] Ibid 1582.

[31] E.g. Case C-169/14 *Sánchez Morcillo and Abril García*, EU:C:2014:2099; Case C-19/13 *Fastweb*, EU:C:2014:2194; Case C-470/12 *Pohotovosť* , EU:C:2014:101; Case C-399/11 *Melloni*, EU:C:2013:107; Case C-300/11 *ZZ*, EU:C:2013:363; Case C-418/11 *Texdata Software*, EU:C:2013:588; Case C-500/10 *Belvedere Costruzioni*, EU:C:2012:186.

law where we find most substantive discussion of the Charter include cases examining discrimination in the field of social policy,[32] and cases in the area of freedom, security and justice.[33] The Court has referred to the Charter to buttress the choices it makes when different interpretations of EU law are feasible.[34] For the first, time, we have also seen provisions of EU legislation[35] – and even an EU legislative measure in its entirety[36] – invalidated on the basis that the acts do not comply with EU standards of fundamental rights protection. In that light, a sceptical view that the legal effect of the Charter would only ever make a symbolic imprint on fundamental rights case law simply does not sustain. However, it has also been pointed out that if the Court continues to apply the 'manifestly inappropriate' threshold in its assessment of how the EU legislator balances different rights, then 'the odds of successfully contesting the validity of secondary EU law on the basis of an erroneous reconciliation of the fundamental rights at stake are rather slim, so long as the measure is explicit as to the public interest objectives that it pursues and provides some evidence that the legislature took into account methods of confining its interference within reasonable limits'.[37]

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[32] E.g. Case C-198/13 *Julian Hernández and Others*, EU:C:2014:2055; Case C-539/12 *Lock*, EU:C:2014:35; Case C-363/12 *Z*, EU:C:2014:159; Joined Cases C-159/10 and 160/10 *Fuchs*, EU:C:2011:508.

[33] Many of these cases are processed under the urgent procedure; see e.g. recently, Case C-498/14 PPU *Bradbrooke*, EU:C:2015:3 and Case C-146/14 PPU *Mahdi*, EU:C:2014:1320.

[34] E.g. Case C-510/10 *DR and TV2 Danmark*, para. 57, interpreting Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 OJ L167/10 ('in the assessment of the choices of interpretation available to the Court, that approach finds support in the fact that it ensures that broadcasting organisations have a greater enjoyment of the freedom to conduct a business, set out in Article 16 of the Charter of Fundamental Rights of the European Union, while at the same time not adversely affecting the substance of copyright').

[35] Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, EU:C:2010:662, for infringement of the rights protected by Articles 7 (respect for private life) and 8 (protection of personal data) of the Charter; Case C-236/09 *Association belge des Consommateurs Test-Achats and Others*, EU:C:2011:100, for infringement of the rights protected by Articles 21 (prohibition of discrimination based on sex) and 23 (requirement to ensure equality between men and women) of the Charter.

[36] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, EU:C:2014:238, for infringement of the rights protected by Articles 7 and 8 of the Charter.

[37] Anagnostaras, n9 above, 120; he continues: 'In these circumstances, the Court will normally recognise a wide margin of appreciation for the EU legislature to balance the importance of safeguarding the rights and freedoms concerned and to make the political and legal assessments that are necessary in order to set its regulatory priorities'.

At the level of consolidating and developing interpretative principles, the Court has had to reconsider the pre-existing framework of judicial rules on the scope of EU fundamental rights law through the requirements now written expressly into the Treaties and into the Charter itself. In particular, drawing from the explanations drafted to provide guidance on the interpretation of the Charter[38] – to which 'due regard' must be given in accordance with Articles 6(1) TEU and 52(7) of the Charter – the Court has reflected on the express limitations that, first, the Charter is 'addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*' (Article 51(1) of the Charter); and, second, '[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties' (Article 51(2), reflecting the statement in Article 6(1) TEU that '[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties').

Brief references to Article 51(2) in situations where application of the Charter could arguably be justified have been controversial in certain cases.[39] A more reasoned body of case law has emerged on Article 51(1) and the requirement that Member States must be *implementing* Union law to activate the relevance of the Charter. The pivotal ruling on this question – *Åkerberg Fransson* – was an internal market case at the edges of harmonised rules on indirect taxation, in the sense that 'the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT'.[40] Drawing explicitly from the explanations relating to Article 51, the Court held that 'the requirement to respect fundamental rights defined in the context of the Union is

[38] 2007 OJ C303/17.

[39] E.g. Case C-370/12 *Pringle*, EU:C:2012:756, para. 179 (in the context of a stability mechanism for Member States whose currency is the euro); Case C-256/11 *Dereci and Others*, EU:C:2011:734, para. 71 and Case C-333/13 *Dano*, EU:C:2014:2358, para. 88 (in the context of Union citizenship).

[40] Case C-617/10 *Åkerberg Fransson*, EU:C:2013:105, para. 24.

only binding on the Member States *when they act in the scope of Union law*'.[41] The Court expanded upon its reasoning in *Julian Hernández*, explaining that 'the concept of "implementing Union law", as referred to in Article 51 of the Charter, presupposes *a degree of connection* between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other'.[42] Conversely, 'the mere fact that [national] legislation…comes within an area in which the European Union has powers…cannot render the Charter applicable'.[43] Therefore, notwithstanding the breadth of approach suggested by *Åkerberg Fransson* at one level, the Court has declined to review national measures for compliance with the Charter in several cases, on the basis that Member States were not implementing EU rules when they acted.[44]

Importantly for present purposes, the Court confirmed in *Pfleger* that the basic premise of the *ERT* ruling – i.e. that Member States must comply with EU fundamental rights standards when they intend to justify restrictions on free movement rights – has survived the limits now imposed by Article 51 of the Charter:

> [W]here a Member State relies on overriding requirements in the public interest in order to justify rules which are liable to obstruct the exercise of the freedom to provide services, such justification, provided for by EU law, must be interpreted in the light of the general principles of EU law, in particular the fundamental rights henceforth guaranteed by the Charter. Thus the national rules in question can fall under the exceptions provided for only if they are compatible with the fundamental rights the observance of which is ensured by the Court [citing *ERT*, para. 43]. … That obligation to comply with

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[41] *Åkerberg Fransson*, para. 20 (emphasis added); confirmed in e.g. C-418/11 *Texdata Software*, EU:C:2013:588, para. 72. In her Opinion in *Sabou*, a case on the free movement of capital and taxation, AG Kokott argued that the guidance on the scope of Union law codified in Article 51(1) of the Charter, as interpreted by the Court in *Åkerberg Fransson*, would also apply by analogy to rights protected as general principles of Union law (AG Kokott in C-276/12 *Sabou*, EU:C:2013:370, paras 38-39 of the Opinion).

[42] *Julian Hernández,* para. 34 (emphasis added); see generally, paras 32-47 of the judgment.

[43] *Julian Hernández,* para. 46.

[44] E.g. Case C-206/13 *Siragusa*, EU:C:2014:126; Case C-265/13 *Torralbo Marcos,* EU:C:2014:187; and Case C-117/14 *Nisttahuz Poclava*, EU:C:2015:60. See generally, Leonard Besselink 'The parameters of constitutional conflict after Melloni' (2014) 39:4 531; Filippo Fontanelli 'Implementation of EU law through domestic measures after Fransson: the Court of Justice buys time and "non-preclusion" troubles loom large' (2014) 39:5 ELRev 782; and Michael Dougan 'Judicial review of Member State action under the general principles and the Charter: defining the "scope of Union law"' (2015) 52:5 CML Rev 1201.

> fundamental rights manifestly comes within the scope of EU law and, consequently, within that of the Charter. The use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must, therefore, be regarded…as 'implementing Union law' within the meaning of Article 51(1) of the Charter.[45]

However, it has also been made clear that the legal status on the Charter is not in itself sufficient to trigger reappraisal of substantive rules of internal market case law. For example, in *Pelckmans Turnhout*, the Court declined to re-open the exclusion of national rules establishing limits on opening hours that affect all traders in the same way from the scope of EU law on the free movement of goods and services.[46]

The picture that emerges overall is therefore one of some substantive advancement in fundamental rights protection post-Lisbon: but a progression, nevertheless, within limits.

4. What kind of market is the Charter shaping through adjudication? Assessing post-Lisbon methodology and priorities

In this section, Weatherill's inter-connected premises of *methodology* and *priorities* are examined in relevant post-Lisbon case law. Building on the objective of assessing the added legal value of the Charter mapped in Section 3, Section 4a focuses on the method applied when the Court evaluates the proportionality of restrictions. In Section 4b, the increased emphasis that is now placed on balancing different interests at stake is considered in light of the actual priorities that seem to be determining the outcomes of cases within the parameters of that mechanism. Overall, the analysis leads outwards from the specifics of internal market adjudication to wider concerns connected to informing and distinguishing the character of EU law. Ultimately, the

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[45] Case C-390/12 *Pfleger*, EU:C:2014:281, paras 35-36; drawing from the explanations on this point, see AG Sharpston, paras 37-46 of the Opinion (EU:C:2013:747). See similarly, Case C-98/14 *Berlington Hungary and Others*, EU:C:2015:386, paras 112-113. For critique, see Jukka Snell 'Fundamental rights review of national measures: nothing new under the Charter?' (2015) 21:2 EPL 285 at 302-306.

[46] Case C-483/12 *Pelckmans Turnhout*, EU:C:2014:304; the referring court had raised 'the principles of equality and non-discrimination, laid down in Articles 20 and 21 of the Charter, read in the light of Articles 15 and 16 of the Charter and Articles 34 TFEU to 36 TFEU, 56 TFEU and 57 TFEU' (para. 14).

Charter and indeed the protection of fundamental rights would still seem to constitute just one part of that much bigger – and still dominant – project.

a. Methodology: a new legal environment?

Five months after the Lisbon Treaty came into effect, AG Cruz Villalón delivered an Opinion in *Santos Palhota*, a case concerning Belgian rules that restricted the freedom to provide services in the controversial sphere of, once again, the posting of workers. He first rehearsed the standard premises of EU free movement law: principally, that the Court 'uses a broad definition of "restriction" in relation to freedom to provide services, ranging from the actual prohibition of an activity to merely reducing its appeal', while justification arguments based on overriding requirements relating to the public interest 'must be interpreted strictly, and by means of a review of proportionality'.[47] However, he then addressed the coming into force of the Lisbon Treaty, arguing that it was therefore now 'necessary to take into account a number of provisions of primary social law *which affect the framework of the fundamental freedoms*'.[48] In the specific context of the posting of workers, he referred to Articles 9 TFEU[49] and 3(3) TEU,[50] and Article 31 of the Charter.[51] For present purposes, the critical points then followed:

> As a result of the entry into force of the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, *they must no longer be interpreted strictly*. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple

[47] AG Cruz Villalón in Case C-515/08 *Santos Palhota*, EU:C:2010:245, paras 49-50.
[48] Ibid para. 51 (emphasis added).
[49] 'In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'.
[50] Which the Advocate General presented as requiring 'that the construction of the internal market is to be realised by means of policies based on "a highly competitive social market economy, aiming at full employment and social progress"' (AG Cruz Villalón in *Santos Palhota*, para. 51 of the Opinion).
[51] Article 31(1) provides: 'Every worker has the right to working conditions which respect his or her health, safety and dignity'.

> derogation from a freedom, still less an unwritten exception inferred from case-law. To the extent that *the new primary law framework* provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, *and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation*. That view, which is founded on the new provisions of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality.[52]

AG Cruz Villalón intuited important alterations of primary law through the coming into force of the Lisbon Treaty, of which the Charter was just one part. The crucial recognition was of a more complicated legal environment; the basic hope was that the wider range of interests now specified in primary law would in turn fundamentally alter the traditional constructs of free movement and internal market law – principally, through a restructuring of the established understanding of the rights broadly/justifications strictly paradigm.

However, in practice, relevant provisions of the Charter are still invoked as part of the established templates and mainly to illustrate the legitimacy of public interest arguments that would have been recognised as legitimate public interest arguments in any event. For example, in *Blanco Pérez and Chao Gómez*, the Court confirmed that 'restrictions on the freedom of establishment may be justified by the objective of ensuring that the provision of medicinal products to the public is reliable and of good quality', adding that '[t]he importance of that objective is confirmed by Article 168(1) TFEU and Article 35 of the Charter of Fundamental Rights…under which, inter alia, a high level of protection for human health is to be ensured in the definition and implementation of all policies and activities of the European Union'.[53] Similarly, in *Las*, the Court referred to Articles 3(3) TEU and 22 of the Charter (respect for cultural and linguistic identity)[54] as well as Article 4(2) TEU (respect for national identity) to establish that 'the objective of promoting and encouraging the

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[52] AG Cruz Villalón in *Santos Palhota,* para. 53 (emphasis added). He repeated the argument in Case C-577/10 *Commission v Germany*, EU:C:2012:477, para. 45 of the Opinion.

[53] Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez*, EU:C:2008:138, paras 64-65.

[54] Cf. AG Jääskinen, who concluded that 'the principle of linguistic diversity, which is binding only on the institutions and bodies of the Union, cannot be relied on by a Member State against citizens of the Union in order to justify a restriction on their fundamental freedoms' (EU:C:2012:456, para. 57 of the Opinion).

use of Dutch, which is one of the official languages of the Kingdom of Belgium, constitutes a legitimate interest which, in principle, justifies a restriction on the obligations imposed by Article 45 TFEU'.[55] In *Fra.bo*, AG Trstenjak suggested that the Charter might also play a role in the justification arguments submitted by private parties caught by the Treaty freedoms.[56]

However, even justifiable restrictions are next pushed through the critical filter of proportionality review. Moreover, where rights protected by the Charter are restricted, the relevant measure should be assessed against the specific requirements of Article 52(1), which include but go beyond a proportionality test:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[57]

The explanations relating to Article 52(1) outline that its 'wording is based on the case-law of the Court of Justice'. First, the decision in *Karlsson* is cited: 'it is well established in the case-law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights'.[58] The explanations also clarify that the 'reference to general interests recognised by the Union covers both the objectives mentioned in Article 3 [TEU] and other interests protected by specific provisions of the Treaties such as Article 4(1) [TEU] and Articles 35(3), 36 and 346 [TFEU]'.[59] Noting that this

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[55] Case C-202/11 *Las*, EU:C:2013:239, paras 26-27.
[56] AG Trstenjak in Case C-171/11 *Fra.bo*, E U:C:2012:176, paras 56-57 of the Opinion.
[57] For an overview of the different elements of this provision, see Koen Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights' (2012) 8:3 ECL Review 375 at 388-393.
[58] Case C-292/97 *Karlsson and Others*, EU:C:2000:202, para. 45.
[59] The text of Article 3 TEU is provided in Section 1 above. Article 4(1) TEU confirms the principle of conferral i.e. that 'competences not conferred upon the Union in the Treaties remain with the Member States'. Articles 36 and 346 TFEU address public interest

spread of references connects in part to Lisbon-enriched provisions of the TEU and TFEU, there is at least a shading here of the ambitious reconfiguration proposed by AG Cruz Villalón in *Santos Palhota.*

However, where a measure restricts a fundamental freedom *as well as* a fundamental right, the Court has not transferred its standard method of scrutiny from the requirements of objective justification and proportionality over to the more detailed elements of Article 52(1). In *Pfleger*, the Court ruled that national legislation that restricted the provision of services under Article 56 TFEU 'is also capable of limiting the freedom to choose an occupation, the freedom to conduct a business and the right to property enshrined in Articles 15 to 17 of the Charter'.[60] But it did not carry out a distinct assessment of that measure under Article 52(1) of the Charter. Instead, it concluded that since it had already established that the measure was a disproportionate restriction of the freedom to provide services under Article 56 TFEU, that determination 'covers also possible limitations of the exercise of the rights and freedoms provided for in Articles 15 to 17 of the Charter, so that a separate examination is not necessary'.[61] The Court referred expressly to the Opinion of AG Sharpston, where she explained the point as follows:

> Article 15(2) of the Charter recognises the freedom of every citizen of the Union to exercise the right to establishment and to provide services in any Member State. The explanations relating to the Charter confirm that Article 15(2) deals with the freedom of movement for workers, freedom of establishment and freedom to provide services guaranteed by Articles 26, 45, 49 and 56 TFEU. As provision for this freedom is made within the Treaties, its scope and interpretation is determined by Article 52(2) of the Charter, which states that such freedoms 'shall be exercised under the conditions and within the limits defined by those Treaties'. The explanation to Article 52(2) also confirms that 'the Charter does not alter the system of rights conferred by the EC Treaty and taken over by the Treaties'. Thus, so far as the present proceedings are concerned, respect for Article 15(2) of the Charter is coterminous with compliance with Article 56 TFEU.[62]

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derogations from the free movement of goods and the essential interests of Member State security respectively.

[60] *Pfleger*, para. 57.

[61] *Pfleger*, para. 60. Confirmed in *Berlington Hungary and Others*, paras 90-91.

[62] AG Sharpston in *Pfleger*, para. 63 of the Opinion.

Similarly, she noted that Article 16 of the Charter (freedom to conduct a business) 'expressly states that this must be "in accordance with Union law and national laws and practices". As the explanations relating to the Charter also confirm, this freedom may be subject to limitations that are permitted by Article 52(1) of the Charter'.[63] Having added that the right to property protected in Article 17 of the Charter may also be limited by proportionate restrictions in the general interest,[64] she concluded that 'Articles 15 to 17 of the Charter *impose no greater obligations* to be satisfied for a restriction on the freedom to provide services to be permitted than is already established by the case law of the Court in relation to Article 56 TFEU'.[65]

But should the acknowledged legal overlap in terms of the scope of free movement *rights* that are protected both as Treaty freedoms and by the Charter also extend to the scope of the criteria for assessing the *limits* placed on those rights and freedoms? In *Pfleger*, the Court found a disproportionate restriction of Article 56 TFEU; but what if it did not? Would further review under Article 52(1) of the Charter still be excluded then? The first point – on the scope of rights and freedoms – is more clearly resolved by the wording of the Charter itself. Thus, in *Sokoll-Seebacher*, the Court reasoned as follows:

> [T]he referring court raises questions about the interpretation not only of Article 49 TFEU, relating to the freedom of establishment, but also of Article 16 of the Charter setting out the freedom to conduct a business. Article 16 of the Charter provides that '[t]he freedom to conduct a business in accordance with European Union law and national laws and practices is recognised'. Thus, when identifying the scope of the freedom to conduct a business, Article 16 of the Charter refers specifically to European Union law. That reference to European Union law must be understood as meaning that Article 16 of the Charter refers, inter alia, to Article 49 TFEU, which guarantees the fundamental freedom of establishment. In those circumstances and given that the questions referred concern the freedom of establishment only, the national legislation at issue in the main proceedings should be assessed with regard to Article 49 TFEU alone. [66]

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[63] Ibid para. 64.
[64] Ibid paras 67-68.
[65] Ibid para. 70 (emphasis added).
[66] Case C-367/12 *Sokoll-Seebacher*, EU:C:2014:68, paras 20-23. See similarly, AG Wahl in C-270/13 *Haralambidis*, EU:C:2014:1358, para. 36 of the Opinion.

But elements of the criteria for assessment of *limits* in Article 52(1) of the Charter – notably that they must be provided for by law, and respect the essence of the rights and freedoms recognised by the Charter or reflect a need to protect the rights and freedoms of others – will not necessarily be addressed under the barer suitability and necessity tests applied in free movement law. It is interesting to note that when the Court assesses restrictions on fundamental rights on their own terms – i.e. when not overlapping with restrictions on fundamental freedoms as in *Pfleger* – it does engage explicitly with the different strands of Article 52(1).[67] For example, in *Deutsches Weintor*, addressing Articles 15 and 16 of the Charter, the Court concluded that 'while it is true that the prohibition of the claims at issue imposes certain restrictions on the professional activity of the economic operators concerned in one specific respect, compliance with those freedoms is nevertheless assured *in the essential respects*'.[68] Similarly, in *Sky Österreich*, the Court commented that the relevant provision of the Audiovisual Media Services Directive did 'not *affect the core content* of the freedom to conduct a business. That provision *does not prevent a business activity from being carried out as such* by the holder of exclusive broadcasting rights'.[69] In *ZZ*, the Court also indicated the extra weight of scrutiny under Article 52(1):

> [W]hilst Article 52(1) of the Charter admittedly allows limitations on the exercise of the rights enshrined by the Charter, it nevertheless lays down that any limitation must in particular *respect the essence of the fundamental right in question* and requires, *in addition*, that, subject to the principle of

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[67] A method developed in fundamental rights case law pre-Lisbon: see e.g. Case C-22/94 *Irish Farmers Association and Others*, EU:C:1997:187, para. 27 ('a disproportionate *and intolerable interference*, impairing the very substance of those rights', emphasis added – the Court also analysed fundamental rights and the legitimacy of restrictions placed on them in the light of the 'social function' of fundamental rights); see similarly, *Wachauf*, para. 18 and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood*, EU:C:2003:397, para. 68.

[68] *Deutsches Weintor*, para. 56 (emphasis added). See similarly, AG Mazák at para. 70 of the Opinion, EU:C:2012:189: 'although those rights may be affected by the prohibition at issue, it cannot be maintained that the essence and actual substance of the freedom to conduct a business or the freedom to pursue a trade or profession would be impaired'. See similarly, Case C-426/11 *Alemo-Herron*, paras 33-36. For comment, see Weatherill, n6 above.

[69] *Sky Österreich*, para. 49 (emphasis added); Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (2010 OJ L95/1).

> proportionality the limitation must be necessary *and* genuinely meet objectives of general interest recognised by the European Union.[70]

It is not a given that evaluation of a restriction under Article 52(1) will produce a better outcome from the perspective of protecting fundamental rights.[71] The point is that the questions should at least be *asked* since the outcome might, as a result, be different. More particularly, why do these questions not need to be asked in cases also concerning the restriction of a fundamental freedom? Treaty freedoms and fundamental rights do share certain pivots of overlap, reinforced by the recognition in Article 52(2) of the Charter that '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'. But that should not bring about the *absorption* of fundamental rights by the fundamental freedoms. What, then, would be the point of legal equivalence, as an instrument of primary EU law, for the Charter? In other words, Article 6 TEU is also part of 'those Treaties'. Even if the outcome were the same, providing a place for the criteria of Article 52(1) in the method applied to cases where both freedoms and rights are restricted would at least substantiate the conferring of legal effect on the Charter as a distinct resource of primary EU law.

Additionally, the argument that the Court should alter its proportionality paradigm to protect some features of fundamental rights as *inherent* aspects of those rights has not materialised either.[72] For example, reflecting on how a more coherent line could have been drawn through the pre-Lisbon cases discussed in Section 2, it was argued that there was scope in *Laval* and *Viking Line* for a more context-sensitive discussion of proportionality, justified by an appreciation that the overriding public

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[70] Case C-300/11 *ZZ*, judgment of 4 June 2013, para. 51 (emphasis added).

[71] See e.g. Case C-314/12 UPC *Telekabel Wien*, EU:C:2014:192; in para. 50, the statement that '[a]n injunction such as that at issue in the main proceedings constrains its addressee in a manner which restricts the free use of the resources at his disposal because it obliges him to take measures which may represent a significant cost for him, have a considerable impact on the organisation of his activities or require difficult and complex technical solutions' would suggest proportionality alarm-bells; but it is then stated in para. 51 that '[h]owever, such an injunction does not seem to infringe the very substance of the freedom of an internet service provider such as that at issue in the main proceedings to conduct a business'.

[72] See e.g. *Commission v Germany*, para. 47: 'it cannot be considered that it is inherent in the very exercise of the freedom of management and labour and of the right to bargain collectively that the directives which implement freedom of establishment and the freedom to provide services in the field of public procurement will be prejudiced'.

interest at stake was a fundamental right. In particular, it has been suggested that the Court could have recognised that disruption through strike action is an *inherent* element of collective action with the result that less restrictive measures will not be as effective for the realisation of the broader social policy goals at stake.[73] Interestingly, this method already exists elsewhere in the Court's free movement case law.[74]

The alterations of methodology that can be detected do not, therefore, go nearly as far as the more radical shifts proposed by AG Cruz Villalón. But they do have the potential to accommodate two opposing facts: that the Lisbon Treaty did not change the basic provisions on internal market law and free movement rights; but that it *did* change other crucial premises of EU primary law, including the protection of fundamental rights. The free movement-driven method sustained, and indeed embalmed, in *Pfleger* suggests instead that the priorities underpinning the Court's choices need to be explored too.

b. Priorities: what kind of market is the Charter making?

We saw in Section 2 that a significant stream of the commentary on *Laval* and *Viking Line* critiqued the perceived absence of appropriate normative import for fundamental rights in internal market adjudication compared to the seemingly relentless reach of the 'red-clawed market freedoms'.[75] The approach taken in *Schmidberger* was seen as an exemplar for the balancing of norms attracting *equal*

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[73] See e.g. the arguments of Davies, Novitz, and Sciarra (all n13 above). See further, Niamh Nic Shuibhne 'Settling dust? Reflections on the judgments in *Viking* and *Laval*' (2010) 21:5 EBLR 581; and Catherine Barnard 'A proportionate response to proportionality in the field of collective action' (2012) 37:2 ELRev 117.

[74] Case C-222/07 *UTECA v Administración General del Estado,* EU:C:2009:124, para 36: 'The fact that such a criterion may constitute an advantage for cinema production undertakings which work in the language covered by that criterion and which, accordingly, may in practice mostly comprise undertakings established in the Member State of which the language constitutes an official language *appears inherent to the objective pursued*. *Such a situation cannot, of itself, constitute proof of the disproportionate nature of the measure at issue* in the main proceedings *without rendering nugatory the recognition, as an overriding reason in the public interest, of the objective pursued by a Member State* of defending and promoting one or several of its official languages' (emphasis added).

[75] Weatherill, n6 above, 182.

status and was clearly preferred. It was also noted at the outset of this chapter that the Lisbon Treaty makes a basic contribution to this question in the sense that the Treaties and the Charter are now explicitly conferred with equal status. For those who would have gone further – privileging fundamental rights *above* other norms of Union law – this will be a disappointment. For example, confirming the reasoning applied pre-Lisbon,[76] it is clear that rules adopted to protect fundamental rights will not be exempted from judicial review post-Lisbon either. AG Trstenjak captured the current legal position point in her Opinion in *Commission v Germany*:

> [T]he fact that the right to bargain collectively and of the parties to autonomy in that connection are recognised as fundamental rights does not permit the conclusion, without more, that the substance of the collective agreements, made in exercise of those fundamental rights, and the agreements subordinate thereto automatically fall outside the scope of the fundamental freedoms. In the case of a conflict between a fundamental right and a fundamental freedom, both legal positions must be presumed to have equal status. That general equality in status implies, first, that, in the interests of fundamental rights, fundamental freedoms may be restricted. However, second, it implies also that the exercise of fundamental freedoms may justify a restriction on fundamental rights'.[77]

In its judgment, the Court reflected that conclusion through its statement that '[e]xercise of the fundamental right to bargain collectively must therefore be *reconciled* with the requirements stemming from the freedoms protected by the FEU Treaty'.[78] This phrasing, also seen in both *Laval* and *Viking Line*,[79] reflects paragraph 77 of *Schmidberger*.[80] Importantly, though, that judgment went on to affirm that 'the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a *fair* balance was struck between those interests'.[81]

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[76] E.g. *Omega*, para. 36; *Laval*, para. 94.
[77] AG Trstenjak in Case C-271/08 *Commission v Germany*, EU:C:2010:183, paras 80-81 of the Opinion. See also, the judgment of the Court, para. 41 (EU:C:2010:426).
[78] *Commission v Germany*, para. 44 (emphasis added).
[79] *Laval*, para. 94; *Viking Line*, para. 46.
[80] 'The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty'.
[81] *Schmidberger*, para. 81 (emphasis added).

In post-Lisbon case law concerning the reconciliation of different norms and interests, the Court is not citing *Schmidberger.* Instead, it tends to refer to *Promusicae*, a pre-Lisbon case on electronic communications where it was held that 'Member States must, when transposing [EU] directives…take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order'.[82] Additionally, the primary focus of the fair balance equation in more recent cases has shifted to reconciling different rights *within* the Charter.[83] In other words, the *Schmidberger* problem of balancing *fundamental rights* and *Treaty freedoms* in particular has been overtaken by a broader concern for fair balance across all relevant interests. However, in *Sky Österreich*, the Court wove both sets of questions together: '[w]here several rights *and fundamental freedoms* protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them'.[84]

More consistent use of fair balance language is a positive development. But four points suggest that caution about the expectations that might be sparked by it is advisable. First, the most basic point: the language of fair balance and reconciliation of interests was already used in the case law pre-Lisbon; and it did nothing to preclude some of the most criticised judgments in the Court's history.

Weatherill nails the second point. Commenting on the judgment in *McDonagh*, he writes: '[u]pholding the Regulation's "fair balance" between clashing rights protected by the European Union legal order the Court cited both *Promusicae*, a pre-Lisbon ruling, and *Deutsches Weintor*, post-Lisbon, without suggesting they carry the slightest difference in their substantive significance'. [85] That point led to the

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[82] Case C-275/06 *Promusicae*, EU:C:2008:54, para. 68; the case involved consideration of the rights to property and protection of personal data. Confirmed in e.g. *Telekabel Wien*, para. 46.
[83] E.g. on freedom of establishment, Case C-70/10 *Scarlet Extended*, EU:C:2011:771, esp. paras 43-46 (balancing protection of copyright and freedom to conduct a business – see similarly, Case C-360/10 *SABAM*, EU:C:2012:85, paras 41-44); and *Deutsches Weintor*, (balancing protection of health, freedom to choose an occupation, and freedom to conduct a business).
[84] *Sky Österreich*, para. 60 (emphasis added), citing *Promusicae* and *Deutsches Weintor.*
[85] Weatherill, n6 above, 179 (emphasis added); Case C-12/11 *McDonagh v Ryanair*, EU:C:2013:43.

conclusion used in Section 1 to frame the analysis in this chapter i.e. that 'the Lisbon Treaty's entry into force in 2009 and in particular its grant of binding effect to the Charter *did not alter the methodology or priorities* involved in detailed determinations as to whether the EU legislature has met the required standards of compliance with fundamental rights' (emphasis added). As acknowledged in Section 3, the 'remarkable continuum between the pre- and post-Charter cases'[86] is to be expected at one level, since the Charter was developed to codify – 'make visible' – the fundamental rights already protected within the EU legal order as well as the practices established around protecting them. However, what also continues then are the weaknesses of that system, of its already vulnerable methodology and priorities to which Weatherill draws our attention. Here, it really could have been expected that the Lisbon Treaty would make a material difference. It was certainly loaded with the *potential* to realise more significant change.

Third, while this chapter does not aim to evaluate standards of rights protection in post-Lisbon case law in a substantive sense, it should be noted that multiple problems are being flagged in that respect. For example, Sarmiento and Sharpston observe that '[t]he Court seems to be handling the Charter piecemeal, on a case-by-case basis, and the result is beginning to be an alarming lack of coherence. The problem is not whether the Court is setting the threshold too high or too low in relation to any particular right; but rather in determining what the "standard" threshold actually is'.[87] They illustrate the argument by contrasting the 'maximal degree of protection' given to the right to respect for private and family life (protected by Article 7 of the Charter) in *Digital Rights Ireland*[88] and *Google Spain and Google*,[89] with the fact that 'this provision appears to have lost its initial force in recent cases on the free movement of persons (such as *Iida*[90] and *McCarthy*),[91]

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[86] Snell, n45 above, 298.
[87] Daniel Sarmiento and Eleanor Sharpston 'European citizenship and its New Union: time to move on?' in Dimitry Kochenov (ed.) *Citizenship and Federalism in Europe: The Role of Rights* (CUP 2016), forthcoming.
[88] Joined Cases C-293/12 and C-594/12 *Digital Rights* EU:C:2014:238.
[89] Case C-131/12 *Google Spain SL and Google Inc.*, EU:C:2014:317.
[90] Case C-40/11 *Iida*, EU:C:2012:691.
[91] Case C-434/09 *McCarthy*, EU:C:2011:277.

although it had earlier formed the basis in *Carpenter*[92] for the Court to grant residence rights to a third country national married to a provider of services within the internal market'. Strong criticism that the Court's judgment in *Alemo-Herron* departs from the established approach to freedom of contract provides another example of biting critique on the evolving content of EU fundamental rights law in substance.[93]

Fourth, the paragraphs of the recent judgments leading into statements about balance and reconciliation are revealing too. For example, in *Commission v Germany*, the Court first reaffirms the vectors of diversity built into the relevant provisions of Union law: '[i]t is apparent from Article 28 of the Charter, read in conjunction with Article 52(6) thereof, that protection of the fundamental right to bargain collectively must take full account, in particular, of national laws and practices'.[94] The Court also stated that 'by virtue of Article 152 TFEU the European Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems'.[95] Later in the judgment, however, the Court held that 'while it is true that the right to bargain collectively enjoys in Germany the constitutional protection conferred, generally, by Article 9(3) of the German Basic Law upon the right to form associations to safeguard and promote working and economic conditions, the fact remains that, as provided in Article 28 of the Charter, *that right must be exercised in accordance with European Union law*'.[96] The need to reconcile protection of fundamental rights with the freedoms protected under Union law *then* followed. Addressing fundamental rights in another context, discrimination on grounds of age, the same idea is seen in *Prigge*:

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[92] Case C-60/00 *Carpenter* EU:C:2002:434.

[93] Weatherill, n6 above, describes the Court as taking 'a mystifingly aggressive approach to promoting employ*er* flexibility and, moreover, one which is quite out of line with existing EU law' (167, emphasis in original); see also, Jeremias Prassl, 'Freedom of contract as a general principle of EU law? Transfers of undertakings and the protection of employer rights in EU labour law' (2013) 42:4 ILJ 434.

[94] *Commission v Germany*, para. 38. Article 28 of the Charter provides: 'Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action'.

[95] *Commission v Germany*, para. 39.

[96] *Commission v Germany*, para. 43 (emphasis added); confirmed in e.g. Case C-172/11 *Erny*, EU:C:2012:399, para. 50 (free movement of workers).

> [A]lthough it is apparent, in particular from the first subparagraph of Article 152 TFEU, that the European Union respects the autonomy of the social partners, the fact none the less remains, as is stated in Article 28 of the Charter of Fundamental Rights of the European Union, that the right of workers and employers, or their respective organisations, to negotiate and conclude collective agreements at the appropriate levels must be exercised in accordance with European Union law…The right to collective negotiation set out at Article 28 of the Charter must, within the scope of EU law, *be performed in accordance with EU law*.[97]

While this case did not concern the Treaty freedoms, the Court cited *Laval* and *Viking Line* to support the point extracted above.

What significance does this understanding of EU law as a compound product that sets an outer – prior, even? – boundary around the exercise of rights bring to the framework for judicial review that requires a balancing of rights and freedoms? One striking facet of the answer comes from AG Bot in *Sky Österreich*:

> [F]undamental rights within the Union must be protected *within the framework of its structure and objectives*. It follows that the weighing of the different fundamental rights at stake *does not necessarily call for the same response at national or EU level*. In the present case, I consider…that *the requirements relating to the completion of the internal market* and to the emergence of a single information area *militated in favour* of the adoption by the EU legislature of a compromise between the granting of a free right to short extracts and the financial participation by secondary broadcasters to the costs of acquisition of exclusive transmission right.[98]

AG Bot outlined similar themes in his Opinion in *Melloni*. From the premise that fundamental rights must be interpreted in accordance with their social function – an idea that has long found expression in EU fundamental rights law[99] – AG Bot argued that '[t]hat determination is closely linked to assessments *which are specific to the legal order concerned*, relating particularly to the social, cultural and historical context of that order, and cannot therefore be transposed automatically to other contexts'.[100] That analysis may resonate with the margin of appreciation doctrine applied in

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[97] Case C-447/09 *Prigge*, EU:C:2012:399, paras 46-47.
[98] AG Bot in *Sky Österreich*, para. 80 of the Opinion (EU:C:2012:341, emphasis added).
[99] See again, the references in n67 above.
[100] AG Bot in *Melloni*, para. 109 of the Opinion (EU:C:2012:600, emphasis added).

ECHR law; but a key difference is that it operates to decentralising effect in the ECHR system, but in a more subsuming way at EU level. Anagnostaras is therefore rightly critical of some the possible implications of this argument: 'one can only wonder whether there can ever be *an objective balancing assessment* of fundamental rights that is *blurred by contemplations completely alien to the nature and the operation of these rights*. This would be tantamount to accepting that the provisions of the Charter must be interpreted in the light of the objectives pursued by the EU legislature and *that all conflicts between them must be resolved in such a way as to facilitate the attainment of these aims*'.[101]

Ironically, tying the exercise of fundamental rights to the wider requirements of the system of EU law so tightly actually goes back to the essence of *Schmidberger* balancing at one level: to the point that rights and freedoms are at play simultaneously. This fact is well expressed by Trstenjak and Beysen: 'The widening of the ambit of the fundamental freedoms and the EU fundamental rights has been accompanied by an increasing interconnection, as well as by a growing overlap of their respective scope of application. In many ways, the increased interaction takes the form of *a constructive interplay, which results in a further consolidation of the common values and guarantees protected by the EU fundamental rights and the fundamental freedoms*'.[102] And as we have seen throughout this chapter, a key consequence is that '[t]he resolution of conflicts between different fundamental rights or between fundamental rights and fundamental freedoms should reflect the principle that the EU fundamental rights and the fundamental freedoms *stand on an equal footing*'[103] — an outlook that is legally accurate post-Lisbon although it remains normatively contestable for some.

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[101] Anagnostaras, n9 above, 122 (emphasis added). On whether or not a margin of appreciation does and/or should operate within EU law, see Niamh Nic Shuibhne 'The Court of Justice and fundamental rights: if margin of appreciation is the solution, what is the problem?' in Oddny Arnardottir and Antoine Buyse (eds.) Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders (Routledge, forthcoming 2016).

[102] Verica Trstenjak and Erwin Beysen 'The growing overlap of fundamental freedoms and fundamental rights in the case-law of the CJEU' (2013) 38:3 293 at 309 (emphasis added).

[103] Ibid 311 (emphasis added).

However, a discourse of balancing among equals also perpetuates an illusion, obscuring the fact that a *choice* between relevant rights, freedoms, interests and any other values in play always has to be made eventually. What is therefore concerning about appeals to respect for the specific requirements of EU law is that they are apt to *pre-determine* the choice that will ultimately be made. Weatherill's comment on *Alemo-Herron* specifically can be broadened to explain the more general point here: '[c]laiming to pursue a fair balance but not articulating what weightings apply on that balance where employee and employer interests collide, it has in fact preferred a distinctively pro-employer interpretation of an ambiguous text'.[104] This insight further emphasises the critical significance of priorities: of setting them, of revealing them – and of altering them when the bases of primary law also alter.

To try and understand what the priority of rights needing to be exercised *in accordance with Union law* might actually mean, we can draw from the prescription outlined by the Court in *Opinion 2/13* on EU accession to the ECHR. Here, addressing the specific characteristics and autonomy of EU law,[105] the Court emphasised:

> … the specific characteristics arising *from the very nature of EU law*. In particular, as the Court of Justice has noted many times, EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States…and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves…. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'…The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of

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[104] Weatherill, n6 above, 174.

[105] *Opinion 2/13* on the accession of the EU to the ECHR, EU:C:2014:2454, paras 157-177 in particular, noting that the Union has 'a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation' (para. 158). The Court also reiterated that '[t]he autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU' (para. 170). See generally, Editorial comments 'The EU's Accession to the ECHR – a "NO" from the ECJ!' (2015) 52:1 CMLRev 1.

> goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, *which are part of the framework of a system that is specific to the EU*, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the raison d'être of the EU itself.[106]

The Court then stated that 'fundamental rights as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with [this] constitutional framework.[107]

However, '[h]uman rights are not just another policy area, but according to Articles 2 and 3 TEU one of the very founding values of the EU, which it is bound to promote'.[108] On that premise, Iglesias Sánchez argues that '[t]he legally binding force of the Charter represents *a fundamental evolution* in the "stage of integration", particularly as *a justification for departing from existing precedents* which affect issues such as the application of the Charter to the action of the Member States, the balancing of conflicting rights, or the interpretation of EU rights with regard to other fundamental and human rights instrument'.[109] Therefore, while Trstenjak and Beysen are right that economic freedoms and fundamental rights do often overlap and do often generate a 'constructive interplay, which results in a further consolidation of the common values and guarantees protected by the EU fundamental rights and the fundamental freedoms', it is also true that economic freedoms and fundamental rights can pull in very different directions too.

5. Conclusion

Reviewing the post-Lisbon case law on internal market adjudication, neither the methodology nor priorities engaged by the Court have yet adjusted to reflect or to manage more successfully the inevitable tensions that emerge between economic rights and fundamental freedoms. The consistent invocation of a balancing paradigm

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[106] *Opinion 2/13*, paras 166-167, and 172 (emphasis added).
[107] Ibid, para. 177.
[108] Snell, n45 above, 305.
[109] Iglesias Sánchez, n27 above, 1566 (emphasis added).

is an advance at one level, but it was shown that the same phrasing was used in pre-Lisbon cases like *Laval* and *Viking Line* with at most a placebo effect. However, critiques that aim only at revealing a still-dominant market-expanding priority in the case law only go so far. The Court's concern to characterise, defend and preserve EU law as the distinctive and autonomous product of a distinctive and autonomous legal system adds something crucial to the picture too

The work of making the EU legal system got going through questions about customs duties. Naturally enough, then, concern for the specific characteristics of that system has left an indelible mark on how questions about the internal market are adjudicated. The Lisbon Treaty does provide the EU judiciary with the tools that it would need to reorient its judicial review framework in this field at one level. But the tools will not use themselves. The complicated legal environment put in place by that Treaty does not, on its own, resolve the questions and tensions underlying the making of the internal market: in fact, its proliferation of Union objectives as a predominantly *equal* normative fiction actually makes the complexities more pronounced. The Charter is an instrument rather than an end-point in the wider endeavour to amplify both the normative value and material protection of fundamental rights in the system of EU law generally, and in the framework of internal market adjudication more specifically. Looking at case law patterns post-Lisbon, shifts in adjudicative language and also instances of progress with substantive rights protection can be identified. However, the former development will not yield a more existential reordering of the various priorities scattered across primary Union law. Both the pace and extent of material progress are then, inevitably, qualified.

The goal of realising a free movement-driven internal market sits within and is contained by the wider structure of the Treaties and their objectives. On one view, the binding of internal market adjudication to the interconnected concerns of Union law more broadly reflects this very construction. But locating a more distinctive space for Charter-specific analysis of restrictions when Charter rights are engaged, rather than drawing the line at the boundaries of the Treaty freedoms, would make a difference that better reflects fundamental rights as values on which the Union is

founded; and so could a reimagined understanding of proportionality that accommodates the inherent qualities of fundamental rights more concretely. Development of these methods depends, however, on a more fundamental and overt statement that priorities are being reconsidered and recalibrated. Otherwise, things will stay the same – so there might be *Omegas* and *Schmidbergers*; but there will also be more *Lavals.*